

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 March 2009

CASE NO.: 2008-CER-1

In the Matter of:

CHARLES W. ROBERTS,
Complainant

v.

WEPFER MARINE, INC.,
Respondent

DECISION AND ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT

This proceeding arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9610, the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9i, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971, the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367, and the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622. The Regulations in 29 C.F.R. Part 24, as well as those in 40 C.F.R. Part 108, establish procedures for the handling of complaints and discriminatory actions under these statutes.¹ Settlement agreements under the SDWA and the TSCA must be submitted for approval by an administrative law judge. 29 C.F.R. 24.111(c).

On February 10, 2009, the parties filed a Settlement Agreement ("Agreement"). The Agreement provides that Complainant releases Respondent from claims arising under the CERCLA, SDWA, SWDA, FWPCA, TSCA, and a variety of other federal and state laws. This review is limited to whether the terms of the Agreement are a fair, adequate, and reasonable settlement of Complainant's allegations that Respondent violated the CERCLA, SWDA, FWPCA, SDWA, and TSCA. *Kidd v. Sharron Motor Lines, Inc.*, Case No. 87-STA-2 (Sec'y July 30, 1987); *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, slip op. at 2 (Nov. 2, 1987). As was stated in *Poulos v. Ambassador Fuel Oil Co., Inc.*,

[The Secretary's] authority over settlement agreements is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statute. *See Aurich v. Consolidated Edison Company of New York, Inc.*, Case No. CAA-2, Secretary's

¹ The Rules of Practice and Procedure, found at 29 C.F.R. Part 18, also applies to the acts.

Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary's Decision and Order on Remand, issued November 3, 1986.

I have therefore limited my review of this Agreement to determining whether the terms thereof are a fair, adequate, and reasonable settlement of Complainant's allegations that Respondent violated the CERCLA, SWDA, FWPCA, SDWA, and TSCA.

The Agreement provides a general release of claims in paragraph 3. The paragraph also includes a provision stating that Complainant waives any claims that he "may have, . . . , for or by reason of any cause, matter, or things whatsoever, past or present, based on the same or on any matter whatsoever." This could clearly be construed as a waiver by the complainant of any cause of action potentially arising in the future. These provisions must be interpreted as limited to the right to sue in the future on claims or causes of action arising out of facts or any set of facts occurring before the Agreement became effective. *Bittner v. Fuel Econ. Contracting Co.*, Case No. 88-ERA-22, slip op. at 2 (Sec'y June 28, 1990).

The parties also agreed not to make disparaging remarks about the other, and that Respondent's owner will inform prospective employers that Complainant is a good worker. No admissions of liability are made within the Agreement, and the provisions are severable.

Paragraph 4 of the Agreement provides that Complainant and his spouse, attorney, and tax preparer will keep the existence of, the amount of, and the terms of the Agreement confidential. No exceptions are specified. The parties agreed that the Respondent may file an action to enforce and recover damages for any breach of the confidentiality agreement. As the provision appears to broadly prohibit disclosure under all circumstances, I interpret the provision as not restricting Complainant from disclosing the terms of the agreement where he is required to do so by law.

The records in this case are government agency records which must be made available for public inspection and copying under the Freedom of Information Act ("FOIA").² It has been held that with respect to confidentiality provisions in settlement agreements that FOIA requires federal agencies to disclose requested documents unless they are exempted from disclosure. *Faust v. Chemical Leaman Tank Lines, Inc.*, Case Nos. 92-SWD-2 and 93-STA-15, (ARB Mar. 31, 1998); *Gerald Fish v. H&R Transfer*, ARB Case No. 01-071, ALJ Case No. 00-STA-56 (ARB Apr. 30, 2003). However, Respondent will be provided a pre-disclosure notification, giving it the opportunity to challenge any such potential disclosure. The Agreement itself is not appended, and the Agreement will be separately maintained and marked confidential.

I find that the terms of the "confidentiality" provision do not violate public policy in that they do not prohibit Complainant from communicating with appropriate government agencies. See e.g., *Bragg v. Houston Lighting & Power Co.*, Case No. 94-ERA-38 (Sec'y June 19, 1995); *Brown v. Holmes & Narver*, Case No. 90-ERA-26 (Sec'y May 11, 1994); *The Conn. Light & Power Corp. v. Sec'y of the U.S. Dep't of Labor*, Case No. 95-4094, 1996 U.S. App. LEXIS 12583 (2d. Cir. 1996); and, *Anderson v. Waste Mgmt of New Mexico*, Case No. 88-TSC-2, slip

² 5 U.S.C. § 552 (1988).

op. at 2 (Sec'y Dec. 18, 1990)(Secretary honored the parties' confidentiality agreement except where disclosure may be required by law).

Paragraph 9 states that any disputes regarding the Settlement Agreement will be resolved "in a court of competent jurisdiction located in Shelby County, Tennessee, and under Tennessee law." This provision is interpreted as not limiting the authority of the Secretary or any United States court to seek or grant appropriate relief under any applicable federal whistleblower statute or regulation. *Phillips v. Citizens Assoc. for Sound Energy*, Case No. 91-ERA-25 (Sec'y Nov. 4, 1991).

As so construed, noting that the parties are represented by counsel, I find the terms of the Agreement to be fair, adequate, and reasonable, and therefore, approve it. Accordingly, the complaint is hereby dismissed with prejudice.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).